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No. 84-1010

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

LYDIA B. CHAMPION, *et al.*,
Petitioners,

v.

GEORGE DEUKMEJIAN, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF IN OPPOSITION OF CALIFORNIA STATE EMPLOYEES ASSOCIATION, EDMUND G. BROWN, JR., ALLEN P. GOLDSTEIN, KENNETH CORY, LEO MAYER AND CHARLES P. VALDES

RAYMOND C. FISHER
WAYNE STEPHEN BRAVEMAN
FRANK E. MELTON
609 S. Grand Avenue
Los Angeles, CA 90017

BERNARD L. ALLAMANO
1108 O Street
Sacramento, CA 95814

JAMES B. COPPESS
LAURENCE GOLD
(Counsel of Record)
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether the district court abused its discretion in weighing the likelihood of success on the merits, the existence of irreparable harm, and the balance of hardships to the parties, and in determining that the preliminary injunction requested by petitioners (plaintiffs below) should not issue.

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California State Employees Association, Edmund G. Brown, Jr., Allen P. Goldstein, Kenneth Cory, Leo Mayer and Charles P. Valdes, defendants in the district court and respondents in this Court, submit that the petition for a writ of *certiorari* should be denied and jointly file this brief in opposition.

STATEMENT OF THE CASE

In this case, the court of appeals affirmed the district court's denial of a preliminary injunction against the enforcement of those sections of the California State Employer-Employee Relations Act ("SEERA" or the "Act"), California Government Code § 3512, *et seq.*,

which authorize collection and use of "fair share fees" by respondent California State Employees Association ("CSEA").

a. Under SEERA, the employee organization elected as the exclusive bargaining representative for state employees in a bargaining unit covered by the Act may enter into an agreement with the state providing that employees in the unit shall pay a "fair share fee" that assures that the exclusive representative "receive[s] financial support from those employees who receive the benefits of [its] representation." Cal. Gov't. Code §§ 3512 and 3515.7(a)(b); App. 43a, 45a-46a. This fee may not exceed the dues paid by members and must "be used to defray the cost incurred by the recognized employee organization in fulfilling its duty to represent the employees in their employment relations with the state . . ." Cal. Gov't Code § 3513(j); App. 44a.

SEERA protects objecting fee payers by providing that any state employee paying a fair share fee has the right to demand and receive a refund of the portion of the fee equal to the employee's pro rata share of union expenditures "either in aid of activities or causes of a partisan political or ideological nature only incidentally related to the terms and conditions of employment, or applied towards the cost of any other benefits available only to members of the recognized employee organization . . ." Cal. Gov't. Code § 3515.8; App. 47a. The Act excludes from this returnable amount "the costs of support of lobbying activities designed to foster policy goals and [sic] [1] collective negotiations and contract administration, or to secure for the employees represented advantages in wages, hours and other conditions of employment in addi-

[1] The "and" following "policy goals" appears to be a legislative "typographical error" in that the portion of SEERA quoted above is otherwise a verbatim copy of a parallel New Jersey statute, N.J.S.A. 34:12A-5.5(c), which instead uses the word "in". The district court noted this discrepancy. App. 3a.

tion to those secured through meeting and conferring with the state employer." *Id.*

The employee organization's administration at its fair share fee provision is subject to review by the California Public Employment Relations Board ("PERB"), the expert state administrative agency charged with administering SEERA. Cal. Gov't. Code § 3515.7; App. 47a. The employee organization collecting a fair share fee is required to keep an "adequate itemized record of its financial transactions" and to provide PERB and the represented employees with "a detailed written financial report [of these transactions] in the form of a balance sheet and an operating statement, certified as to accuracy by its president and treasurer or comparable officers." Cal. Gov't. Code § 3515.7(e); App. 46a-47a.

b. Pursuant to § 3515.8 of the Act CSEA sets the fair share fee at an amount one dollar under its regular dues to reflect the costs of members only benefits. Murch Affidavit ¶ 18. CSEA has also instituted a refund procedure pursuant to the Act, which includes a voluntary internal remedy an objecting fee payer may use to challenge the amount of the refund provided by CSEA before filing such a challenge with PERB. Gress Affidavit, ¶ 15. Since July 1, 1983, CSEA has provided objecting employees with an immediate up-front deduction in monthly dues by an amount equal to the pro rata share of CSEA's political and ideological expenditures. App. 20a, 29a. Subsequent to the decision by the district court, CSEA has, moreover, held in an interest-bearing escrow account an additional portion of any objector's fee payment sufficient to guarantee against temporary subsidization of any activities later held to be subject to refund.

c. In the district court, petitioners—objecting fee payers in bargaining units represented by CSEA—moved for a preliminary injunction freeing them and all fee payers from any obligation to pay fair share fees, claiming that the fair share fee provisions of SEERA are constitution-

ally invalid on their face and as applied. The district court denied the motion, on the grounds that plaintiffs had demonstrated little likelihood of success on the merits of their First Amendment, due process and equal protection claims, App. 11a-19a, and that in any event the evidence in the record showed CSEA would be "seriously harmed" by such an injunction against collection of all fair share fees, App. 20a-21a. The district court also noted that the one category of expenditures on which plaintiffs focussed—CSEA's lobbying activities—totalled $154,000, only a little over three percent of the fair share fees collected. App. 21a.

The court of appeals unanimously affirmed, finding that under this Court's holdings in prior challenges to union agency-fee arrangements, including last term's decision in *Ellis v. Railway Clerks*, —— U.S. ——, 104 S.Ct. 1883 (1984), the district court did not abuse its discretion in declining to issue a preliminary injunction. App. 30a-36a.

REASONS FOR DENYING THE WRIT

The sole question raised by the petition here is whether the courts below erred in concluding that this case is *not* one in which a federal court should, in the exercise of its equitable discretion, issue a preliminary injunction. That discretion is a wide one and the standard for appellate review of the grant or denial of a preliminary injunction is correspondingly narrow: whether the district court abused its discretion in weighing the likelihood of success on the merits, the existence of irreparable harm, and the balance of hardships to the parties. *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931-32 (1975). Such abuse of discretion questions are, except in the narrowest circumstances, inherently inappropriate for review through a writ of *certiorari* and petitioners do not come close to showing that any such circumstance is present here.

To the limited extent that the courts below needed to address on a preliminary basis the merits of petitioners' First Amendment and Fourteenth Amendment challenges to the fair share fee provisions of SEERA, their findings that petitioners had demonstrated little likelihood of success on the merits are consistent with this Court's decisions in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), and in *Ellis v. Railway Clerks*, —— U.S. ——, 104 S.Ct. 1883 (1984). *See* Section I, *infra*.

Furthermore, even if petitioners had demonstrated a sufficient likelihood of success on the merits, the sweeping preliminary injunctive relief sought by petitioners is both improper under this Court's decisions in *Abood*, *Railway Clerks v. Allen*, 373 U.S. 113 (1963), and *Machinists v. Street*, 367 U.S. 740 (1961), and unjustified by the facts on the record. *See* Section II, *infra*.

Contrary to petitioners' claim, there is no conflict among the lower courts as to what type of fair share procedure is sufficient under the First Amendment and the Due Process Clause to protect objectors' rights. The court of appeals decision is fully in accord with the only other decision at all in point: *Robinson v. New Jersey*, 741 F.2d 598 (3d Cir. 1984), *pet. for cert. filed*, No. 84-920 (Dec. 10, 1984). The two cases cited by petitioners—*Hudson v. Chicago Teachers Union Local No. 1*, 743 F.2d 1187 (7th Cir. 1984) and *School Committee of Greenfield v. Greenfield Education Ass'n.*, 385 Mass. 70, 431 N.E.2d 180 (1980)—do not in fact address the issue presented by this case. *See* Section II, *infra*.

Before turning to a discussion of the points outlined above, we emphasize that petitioners have not challenged the determination of the courts below that the balance of hardships to the parties does *not* warrant issuing the preliminary injunction requested by petitioners. Indeed, petitioners could not successfully challenge this determination, because, as the district court explained, "If this court were to enjoin the collection of all fair share fees,

plaintiffs would become free riders accepting the services of CSEA but refusing to contribute to any of its costs." App. 21a. The conclusion of the courts below with respect to the balance of hardships is entirely consistent with the Court's recognition that to allow such free riding "might well interfere with . . . the unions' performance of these functions and duties which the [statute] places upon them to attain its goal of stability in the industry." *Street*, 367 U.S. at 771.

We submit that this unchallenged determination is sufficient in itself to establish that it was not an abuse of discretion to deny the preliminary injunction sought by petitioners. Nevertheless, we now proceed to consider the challenges to the decisions below that petitioners do raise and to show that petitioners are not likely to succeed on the merits and that the broad preliminary injunction they requested is improper under this Court's precedents; to show, in other words, that petitioners have not established any of the requirements for preliminary relief.

I. The District Court Did Not Abuse Its Discretion in Refusing To Grant a Broad Preliminary Injunction on the Basis of California's Authorization of the Use of Fair Share Fees for Limited Categories of Employment-Related Lobbying Activities.

California law permits the exclusive representative of a bargaining unit of state employees to finance a pro-rata share of a narrow range of employment-related lobbying with fair share fees, *viz.*, "lobbying activities designed to foster policy goals and [sic] collective negotiations and contract administration, or to secure for the employees represented advantages in wages, hours, and other conditions of employment in addition to those secured through meeting and conferring with the state employer." Cal. Gov't Code § 3515.8; App. 47a.

The court of appeals considered the facial constitutionality of this statutory authorization for the limited pur-

pose of determining whether this provision of SEERA provides a separate ground for the broad preliminary injunctive relief sought by petitioners. And, consistent with the limited scope of appellate review of a district court decision denying preliminary relief, the court of appeals stated its holding with respect to this part of the Act in narrow terms: "[T]he district court did not abuse its discretion in declining to issue a preliminary injunction on this limited basis." App. 34a. This conclusion follows from the principles stated by this Court in *Ellis* and is consistent with that reached in the only other court of appeals decision to consider this question—*Robinson v. New Jersey*, 741 F.2d 598 (3d Cir. 1984), *pet. for cert. filed*, No. 84-920 (Dec. 10, 1984).

Part VI of this Court's opinion in *Ellis* sets forth the test for determining which union activities may constitutionally be financed out of agency fees over the fee payer's objection:

> At a minimum, the union may constitutionally 'expend uniform exactions under the union-shop agreement in support of activities germane to collective bargaining.' The issue is whether [the] expenses involve additional interference with the First Amendment interests of objecting employees, and, if so, whether they are nonetheless adequately supported by a governmental interest. [104 S.Ct. at 1896 (citation omitted).]

Thus, the test for whether the states may in ordering their labor relations permit a union to use a portion of the money paid by each covered employee to finance a particular expenditure requires a determination first of whether the expenditure "involve[s] additional interference with the First Amendment interests of objecting employees" beyond that worked by expenditures "germane to collective bargaining," and, if it does, whether the expenditure is "nonetheless adequately supported by a governmental interest."

The court of appeals began its consideration of the constitutionality of the Act's authorization for employment-related lobbying expenditures by reciting *Ellis*' definition of expenditures "germane to collective bargaining," App. 34a, *viz.*, the definition of "the minimum [for which] the union may constitutionally 'expend uniform exactions under the union-shop agreement . . . .'" 104 S.Ct. at 1896. The court of appeals then went on to note:

> [I]n *Abood* the Court recognized that in public employment, as contrasted with private employment under the Railway Labor Act at issue in *Ellis*, the line between permissible and impermissible expenditures may be "somewhat hazier." The Court stated:
>
> > The process of establishing a written collective-bargaining agreement prescribing the terms and conditions of public employment may require not merely concord at the bargaining table, but subsequent approval by other public authorities; related budgetary and appropriation decisions might be seen as an integral part of the bargaining process.
>
> *Abood*, 431 U.S. at 236. The determination of whether certain expenditures are proper depends on the nature of the bargaining process. *See Ellis*, 104 S.Ct. at 1892; *Abood*, 431 U.S. at 236 & n.33. [App. 34a-35a.]

That court concluded that under *Ellis* and *Abood* the determination of whether the employment-related lobbying expenditures authorized by the California Act are constitutional requires consideration of the practical requirements of California's state labor relations system. App. 35a.

In making that examination, the court of appeals pointed out that in the California state sector collective bargaining, even as narrowly defined to encompass only the activity of reaching agreement at the bargaining table, necessarily requires resort to the state legislature:

> Section 3515.8 of SEERA, which plaintiffs challenge as impermissibly broad, is based on the understanding that collective bargaining in the public sector requires resort to the legislature on various employment-related questions. *See Abood*, 431 U.S. at 236. Section 3517.5 requires that the state employer-employee agreement, or memorandum of understanding, be presented "to the Legislature for determination." Cal. Gov't Code § 3517.5. The expenditure of funds required by the memorandum of understanding is dependent upon legislative approval, as is the implementation of other provisions which may be inconsistent with various state statutes. *See id.* § 3517.6. [App. 35a.]

Indeed, § 3517.6 of SEERA contemplates resort to the legislature with respect to terms of an agreement in conflict with a statutory provision:

> If any provision of the memorandum of understanding requires legislative action to permit its implementation by amendment of any section not cited above [as an exception], those provisions of the memorandum of understanding shall not become effective unless approved by the Legislature. [Cal. Gov't Code § 3517.6.]

And § 3517.7 of the Act provides that negotiations may be reopened with respect to any provision of an agreement not funded by the legislature. Cal. Gov't Code § 3517.7.

The court of appeals also observed that many state statutes cover terms and conditions of employment that would be subject to negotiation in the private sector, and that these statutes not only directly affect the working conditions of represented employees but also set the contours for collective bargaining:

> Because public employees work for the state, matters which are ordinarily left to direct negotiations in the private sector are covered by statute. For ex-

> ample, grievance adjustment, Cal. Gov't Code § 18714; computation of leave when there is a break in service, *id.*, § 19143; the policy of paying female workers on the principle of comparable worth to remedy great discrepancies between male and female workers' salaries, *id.* § 19827.2(a); the notice and hearing procedure when an employee's salary is changed, *id.* § 19828; and the use of hourly or day workers, *id.* § 19830, are provided by statute, but may be changed through negotiation. See generally *id.* § 3517.6 for a list of statutes affecting public employees. These statutes create a status quo from which the bargaining representatives start negotiations for their particular units. The importance of legislation affecting public employment, enacted in a forum apart from the meet-and-confer sessions authorized by statute, Cal. Gov't Code § 3517, requires that public employee representatives be given broad authority to protect their members' interests before the legislature. [App. 35a-36a.]

SEERA requires that the state employers and the Governor consider the views of the state employees' exclusive representatives with respect to terms and conditions of employment in formulating legislative proposals and state policies that affect those terms and conditions. Cal. Gov't Code §§ 3516.5 & 3517.

The court of appeals' review of public sector labor relations in California makes clear that the employment related lobbying expenditures authorized by the Act are among the "expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union" representing California state employees, *Ellis*, 104 S.Ct. at 1892, and, thus, that these expenditures are within the "minimum [for which] the union may constitutionally 'expend uniform exactions under the union-shop agreement . . . ,'" *id.* at 1896. Moreover, as the court of appeals' opinion also demonstrates, the authorization for such expenditures is "adequately supported by a governmental interest," *id.* at 1896, in

hearing from the representatives of state employees on employment-related matters.

Petitioners' discussion of the Act's employment-related lobbying provision does not take issue with the court of appeals' assessment of the practical requirements of California's state labor relations system. Pet. 20-21. Nor do petitioners even cite this Court's decisions in *Ellis* and *Abood* in their review of this provision, much less challenge the court of appeals' application of these precedents. Instead, petitioners address the lobbying issue in only the most abstract and general terms, asserting that the court of appeals "never addressed the values of the rights impacted or nature of the restrictions imposed by the statutory scheme." Pet. 20. This assertion is patently incorrect, as the court of appeals' careful application of *Ellis* and *Abood* to the California labor relations system (just outlined at pp. 8-10 *supra*) demonstrates. App. 33a-36a.[2]

II. A Broad Preliminary Injunction Freeing Plaintiffs Entirely of Their Fair Share Fee Obligation is Precluded By this Court's Decisions in *Abood, Allen* and *Street.*

a. The court of appeals began its discussion of why a preliminary injunction is improper here from the following basic premise:

> In *International Association of Machinists v. Street*, 367 U.S. 740 (1961), the Court recognized

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[2] Petitioners mischaracterize the Act by suggesting that the statute would allow an objector's fees to be used for such political purposes as contributions to candidates or other partisan activities. *See, e.g.*, Pet. 5 n.3 & 10. It is clear from the terms of the Act that an exclusive representative is not allowed to use an objector's fees for such purposes. Cal. Gov't Code § 3515.8; App. 47a. Nothing said or done by either the court of appeals or the district court is to the contrary. In any event, even were it not clear from the face of the Act that such partisan political expenditures are not permitted over objection, the scope of expenditures permitted by the Act should be determined in the first instance by the California courts. *See Abood*, 431 U.S. at 232-233.

that funds paid to the union by objecting employees, compelled pursuant to the Railway Labor Act, 45 U.S.C. § 152, Eleventh, could only be used for limited purposes. The Court held, however, that an injunction against all such compelled payments was unjustified. It said:

> Restraining the collection of all funds from the appellees [objecting employees] sweeps too broadly, since their obpection is only to the uses to which some of their money is put. Moreover, restraining collection of the funds . . . might well interfere with the appellant unions' performance of those functions and duties which the Railway Labor Act places upon them to attain its goal of stability in the industry.

367 U.S. at 771. In *Allen*, the Court was even more emphatic. It stated that "lest the important functions of labor organizations under the Railway Labor Act be unduly impaired, *dissenting employees* (at least in the absence of special circumstances not shown here) *can be entitled to no relief until final judgment in their favor is entered*" 373 U.S. at 120 (emphasis added). *See* also *Abood*, 431 U.S. at 241 ("For all the reasons outlined in *Street*, the court was correct in denying the broad injunctive relief requested"). . . . [App. 32a-33a.]

In affirming the district court, the court of appeals gave full consideration not only to the foregoing authorities, all of which were relied on by the district court, but also to this Court's intervening decision in the *Ellis* case. App. 33a-36a. In *Ellis* this Court held that a "pure rebate approach," *viz.*, one that incorporates neither of the "acceptable alternatives" of "advance reduction of dues" or "interest-bearing escrow accounts," "reduces but does not eliminate the . . . violation" of an objector's rights. 104 S.Ct. at 1890. As the court of appeals recognized that holding is of no aid to petitioners in this case.

First, since July 1, 1983, shortly after this lawsuit commenced and before the district court ruled on the

preliminary injunction, CSEA has provided objectors with one of the "acceptable alternatives" suggested in *Ellis*, namely an "advance reduction of dues." App. 20a, 29a. CSEA has also, subsequent to the district court's ruling, provided objectors with the additional protection approved in *Ellis* by placing a portion of their reduced fee payments in "interest-bearing escrow accounts," *id.* at 1890, pending determination of whether any refund is due.[3] Second, as the court of appeals points out, *Ellis* does nothing to undermine the teaching of *Abood*, *Allen* and *Street* that a *preliminary injunction* entirely relieving objectors of their obligation to contribute financial support to their representative is improper. App. 36a.

Abood is particularly pertinent, because that case like this one involved a facial constitutional challenge, there to a Michigan statute which had been construed by the state court to allow unions to use an objector's fee payments to finance partisan political activity. 431 U.S. at 232-233. Nevertheless, this Court held that the Michigan court was correct in denying broad injunctive relief, *id.*, at 240-241, reiterating the point made in *Street*, that "[s]ince . . . [*Railway Employes' Dept. v.*] *Hanson*[, 351 U.S. 225 (1956),] had established that the union-shop agreement was not unlawful as such, . . . to enjoin enforcement would '[sweep] too broadly,'" *id.*, at 238. If the Michigan court in *Abood* was correct in denying an injunction that would free the *Abood* plaintiffs entirely of their contractual obligation to financially support union representation under a statute that provided no protection for objecting fee payers, the district court below was surely correct in denying a preliminary injunction relieving the plaintiffs here of their fair share

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[3] Neither of the courts below reached the question of whether CSEA's advance reduction of objectors' fees and the interest-bearing escrow account are sufficient to completely eliminate any violation of plaintiffs' rights, as these are factual determinations properly made on a fully developed record after a trial on the merits.

fee obligation under a statute that on its face and as applied provides substantial protection to objectors.

b. Petitioners erroneously assert there is a conflict between the decision of the courts below and those of other lower courts. In fact, the only other court of appeals decision to consider the question of preliminary relief presented here is completely consistent with the decision below. *Robinson v. New Jersey*, 741 F.2d 598, 615 (3d Cir. 1984), *pet for cert. filed*, No. 84-920 (Dec. 10, 1984). *See also Dean v. Air Line Pilots*, 708 F.2d 486, 487-488 (9th Cir.), *cert. denied*, 104 S.Ct. 490 (1983).

Hudson v. Chicago Teachers Union Local No. 1, 743 F.2d 1187 (7th Cir. 1984), cited at Pet. 16, does not address the issue of preliminary relief at all, much less hold that a preliminary injunction freeing employees of their obligation to contribute financial support to their union is proper. In *Hudson* the district court declined to rule on the plaintiffs' refund claim deferring instead to a union internal rebate procedure. 573 F. Supp. 1505, 1521-22 (N.D. Ill. 1983). The *Hudson* court of appeals disagreed, concluding that an internal union procedure that does not provide for a final determination by a neutral public body cannot be a basis for a federal court's refusal to hear the plaintiffs' claim. The court of appeals in *Hudson* did not order any preliminary relief, but merely remanded for further proceedings consistent with its opinion. 743 F.2d at 1194-97.[4] In the instant case the district court did *not* decline to rule on petitioners' claim for preliminary relief pending resort to CSEA's internal refund procedure, and the court of appeals expressly reserved the question of the adequacy of CSEA's system to fully protect petitioners' rights, App. 36a. Rather, the courts below fully considered petitioners' claims and ruled that those claims did not warrant the preliminary injunction requested.

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[4] Moreover, in *Hudson* the primary deficiency found by the Seventh Circuit in the union's internal system was that the system provided for neither an administrative hearing before a neutral body

In *School Committee of Greenfield v. Greenfield Education Ass'n*, 385 Mass. 70, 431 N.E.2d 180 (1982), cited at Pet. 17, the Massachusetts Supreme Judicial Court construed the Massachusetts agency shop statute as authorizing objecting employees to pay their contested agency fee into an escrow account pending an initial administrative determination of the appropriate amount. 431 N.E.2d at 189-190.[5] Far from approving the sort of broad preliminary relief sought by the plaintiffs here, the Massachusetts court directed the state agency holding the contested fees to make a prompt preliminary determination of the amount clearly payable to the union and to turn that amount over to the exclusive representative without delay. 431 N.E.2d at 190 n.9. As the Massachusetts court noted, "The necessity of protecting the rights of dissenters is not a justification for allowing an association to be 'crippled by nonaccess to that portion of the fee which will be used for collective bargaining, contract administration and grievance adjustment.'" 431 N.E.2d at 189. The district court below found that the preliminary injunction sought by petitioners would cripple CSEA in just this way. App. 20a-21a.

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nor a judicial review proceeding. 743 F.2d at 1196. SEERA, contrary to petitioners' mischaracterization of that Act as allowing CSEA "unbridled discretion with respect to fees," Pet. 10, *does* provide that "[t]he [Public Employment Relations Board] may compel the recognized employee organization to return that portion of a fair share fee which the board may determine to be subject to refund under the provisions of this section." Cal. Gov't Code § 3515.8; App. 47a. *See id.* § 3513(g).

[5] In addition, since *Greenfield* is a statutory construction case, there is nothing in that opinion suggesting that the United States Constitution requires every state to follow the same approach as Massachusetts in protecting the rights of objectors. Indeed, such a holding would be contrary to this Court's holding in *Ellis* that an "advance reduction of dues" or "interest-bearing escrow accounts" are among the "acceptable alternatives" for protecting those rights. 104 S.Ct. at 1890.

In sum, this Court has three times addressed the question of preliminary relief in cases of this sort, and each time has clearly held that a preliminary injunction entirely freeing objectors of any obligation to provide financial support to their exclusive representative is not an appropriate remedy. *Abood*, 431 U.S. at 240-242; *Allen*, 373 U.S. at 119-120, 122; *Street*, 367 U.S. at 771-772. Under these precedents, and particularly in light of the protections given objectors by SEERA and by CSEA's advance reduction and escrow systems, the courts below were undoubtedly correct in denying the petitioners the preliminary injunction they requested relieving them of their entire fair share fee obligation.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

RAYMOND C. FISHER
WAYNE STEPHEN BRAVEMAN
FRANK E. MELTON
609 S. Grand Avenue
Los Angeles, CA 90017

BERNARD L. ALLAMANO
1108 O Street
Sacramento, CA 95814

JAMES B. COPPESS
LAURENCE GOLD
(Counsel of Record)
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390